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IN THE

# Supreme Court of the United States

October Term, 1957.

No. 442.

MILDRED S. STINSON, as Administratrix of the Estate of A. BRUCE STINSON, Deceased, Suing as Such Administratrix,

*Petitioner,*

*v.*

ATLANTIC COAST LINE RAILROAD COMPANY,

*Respondent.*

# PETITIONER'S REPLY BRIEF.

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MILDRED S. STINSON, AS ADMINISTRATRIX OF THE ESTATE OF A. BRUCE STINSON, DECEASED, SUING AS SUCH ADMINISTRATRIX,

*Petitioner*

*v.*

ATLANTIC COAST LINE RAILROAD COMPANY,

*Respondent.*

## PETITIONER'S REPLY BRIEF.

This brief is submitted in reply to respondent's brief in opposition to the Petition for Writ of Certiorari.

## ARGUMENT.

### I.

### The Petition Is Factually Accurate.

The opening of respondent's brief in opposition states that we "represent to this Court as material basis for action by it, that the Supreme Court of Alabama deviously connived at tampering with its own opinions and records. These imputations recklessly disregard and misrepresent record facts. We can only assume that Petitioner chose not to file with this Court certain portions of the Record

of the Supreme Court of Alabama," (respondent's brief, p. 2).

We made it abundantly clear in the Petition, which respondent has studiously avoided, that the unexplained circumstances surrounding the change in the opinion have utterly nothing to do with the basis for the Petition. Our "Reasons for Granting the Writ" (Petition, pp. 9-11) assert the only grounds on which we rely. There is utterly no mention of the change in the opinion there. Those circumstances, which we described with scrupulous accuracy, were discussed because they provide the context for the unavoidable fact that the Petition had to treat two—not one—opinions. We stated this at the very outset of the Petition (p. 16).

We made no "unctuous representations that the Supreme Court of Alabama and its Clerk connived at falsifying its records" (respondent's brief, p. 14). We stated cold facts and nothing more. It is a fact that the opinion was changed. It is a fact that counsel received no notice of the change. It is a fact that no explanation for the change was ever given. It is a fact that the changes that were made left an internal inconsistency in the altered opinion (See Petition, p. 21).

The inferences to be drawn from these bizarre circumstances are a matter of utter indifference to us. They are absolutely unrelated to the reasons for granting the Writ. To the extent that any value judgments have been drawn from them, they were drawn by respondent not us.

We took only one liberty with these facts, and it was to make only those assumptions which exhaust the possibilities of just what the altered opinion could mean (Petition, p. 21). It has not been suggested, nor could it be, that we were anything but fair in making these assumptions.

Insofar as respondent assumes that "Petitioner chose not to file with this Court certain portions of the Record of the Supreme Court of Alabama", it is in stark error

(respondent's brief, p. 2). We did not choose any portions of the record. We requested that the Clerk of the Supreme Court of Alabama forward the *entire record and transcript* in the case for filing in this Court in connection with the Petition for Certiorari. The Clerk certified that he had done so (29a). We could do nothing more.

## II.

## Respondent's Jurisdictional Argument Is Legally and Factually Without Merit.

On the first appeal in this case, the Alabama Supreme Court "reversed and remanded" on March 31, 1955 and denied a rehearing on June 21, 1956 (12a, 15a). Under the law and the practice of Alabama, that order was not a final judgment. On the contrary, the ". . . reversal of a judgment restores the parties to the condition in which they stood before it was rendered. . . ." *Jackson S. & Inv. Co. v. A. Paul Gooddall R. E., Etc. Co.*, 28 Ala. 339, 340, 184 So. 344, 345 (1938). This perforce means a new trial.

In *Gospel Army v. City of Los Angeles*, 331 U. S. 543, 67 S. Ct. 1428 (1947), the Supreme Court of California entered an unqualified reversal which was effective to remand the case for a new trial and place the parties in the same position as if the case had never been tried. This Court held that no appeal from the Supreme Court would lie. The analogy between the case at bar and *Gospel Army* is exact.

Indeed this Court has repeatedly asserted that the grant of a new trial is not a final judgment. *United States v. Denver & Rio Grande Railroad Co.*, 191 U. S. 84, 93, 24 S. Ct. 33, 36 (1903); *Urie v. Thompson*, 337 U. S. 163, 171, 69 S. Ct. 1018, 1025 (1949).

On the second appeal, the Supreme Court of Alabama recognized: (1) that its original order merely granted a new trial; (2) that the original order was not a final judgment; and (3) that under the decisions of this Court,

review of that original order could not have been properly sought. The court said (25a):

> "* * * On appeal, this court decided that the defendant, Atlantic Coast Line Railroad Company, was entitled to the affirmative charge, and the judgment was reversed and the cause remanded. *Atlantic Coast Line Railroad Co. v. Stinson*, 264 Ala. 522, 88 So. 2d 189. Under these circumstances, there being no final judgment, it was impossible to apply to the Supreme Court of the United States for a review of the decision of this court."

Having so recognized the non-finality of this original order of reversal and remand, the Alabama Supreme Court for the first time entered a final judgment (27a-28a). No such final judgment was, or could have been, entered upon the reversal and remand.

In the face of this formidable body of established law, the respondent now seeks to transform the non-final order into a final judgment, and the final judgment into an irrelevancy. The alchemy for this transmutation consists of: (1) inferentially misleading statements in its brief combined with a curious *post hoc* reasoning; and (2) the citation and quotation (out of context) of cases that are totally unrelated to the present situation.

1. On November 13, 1956, the day of decision arrived when petitioner's case came on for re-trial. From June 21, 1956 (the denial of re-hearing) until November, no witness had appeared and no evidence had been discovered. It was petitioner's view during those months that additional witnesses or evidence would not be discovered. On the day of trial she was inevitably compelled to concede of record that no evidence different from or in addition to that of the original trial would be forthcoming. Then,—and then only,—petitioner, pursuant to stipulation of counsel,

offered the previous record in evidence as her case.

The statements on page 16 of respondent's brief imply that this was the situation on June 21, 1956. In retrospect, it was. But no one could have known that with certainty on June 21, 1956. No one could have known it with absolute certainty until the very day of re-trial. Respondent, however, relates the final situation of November 13, 1956, back to the equivocal and uncertain situation of June 21. Having done so, respondent says, in effect, that because it eventually turned out in November that we had no more evidence, we should have stated with finality in June that which we could not know with finality until November. Having demanded the impossible of us, respondent concludes that the June order was final.

Respondent (brief, page 17) attempts to analogize this situation with that of *Pope et al. v. Atlantic Coast Line R. Co.*, 345 U. S. 379, 73 S. Ct. 749 (1953). The two cases are totally dissimilar. In *Pope*, the respondent had sued in the state court to enjoin petitioner from suing in Georgia. Petitioner demurred and the lower court sustained the demurrer. The Georgia Supreme Court reversed and overruled the demurrer. This Court granted certiorari, but ordered argument on the question of finality. Petitioner agreed to the facts and conceded that he was relying only on his legal defense to the complaint, i. e., that the Georgia court had no legal power to enjoin the suit in Georgia under the F. E. L. A. There was no possibility of any factual determination in the trial court.

Here the case was sent back after the first appeal for the further production of evidence and a factual determination by a jury. The petitioner in *Pope* knew upon remand that the issue was purely legal. Here, the issue on remand was factual with no possibility of reaching an agreed state of facts.[1]

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1 Compare petitioner's and respondent's respective Statements of the Case here.

We have pointed out, *supra*, that this Court and the Alabama courts are clear that the grant of a new trial by reversal and remand is not a final judgment. So warned, we have carefully heeded the plain admonition contained in this Court's ruling upon an identical order of this same Alabama court. In *Davis Admrx. v. Alabama Great Southern Railroad Company*, 324 U. S. 846, 65 S. Ct. 676 (1945), in an F. E. L. A. case, the Alabama court held, as it did here, that the affirmative charge should have been given. It ordered, precisely as it did here, that the case be "reversed and remanded". Petitioner immediately sought certiorari, as respondent would have had us do here.[2] This Court said:

> "* * * Petition for writ of certiorari to the Supreme Court of Alabama denied for the reason that it does not appear from the record or from the papers submitted that the judgment is final."

Respondent attempts, vainly, to distinguish this case (brief, p. 21) stating that in *Davis* "it was not established as it is here that *upon rendition of the judgment and opinion in question* Petitioner was unable to produce any other, different or additional evidence on any further trial". It is sufficient to say that here petitioner's inability to produce additional or different evidence was conclusively established both in fact and on the record on the trial date of November 13, 1956, and not before. It was not established "upon rendition of the judgment" on June 21, 1956 as respondent would have the Court believe.

At the time of the denial of rehearing in June, 1956, the most that we could have said with propriety was that "we have no further or additional evidence *at this time*".

It is at least doubtful that where factual issues are at stake on remand, such a qualified statement by counsel

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2. We have no doubt that had we done so, respondent would have argued that "there was no final judgment."

can vest jurisdiction in this Court. No case says so, and an attempt to do it would have been a voyage on uncharted seas. We followed the course laid down by this Court. We know of no doctrine which bars relief to litigants who seek it by routes designated by our courts.

2. The cases cited by respondent in support of its argument do not, upon analysis, substantiate it.

First. Of course, where a state appellate court directs what judgment is to be entered and leaves nothing to be done by the lower court but the ministerial act of entering that judgment, then the appellate judgment has finality. This was the only issue in these cases cited by respondent: *Rio Grande Western Railway Company v. Stringham et al.*, 239 U. S. 44, 36 S. Ct. 5 (1915); *Department of Banking v. Pink*, 317 U. S. 264, 63 S. Ct. 233 (1942); *Cole v. Violette et al.*, 319 U. S. 581, 63 S. Ct. 1204 (1943).

A new trial is not a ministerial act. In *Gospel Army v. City of Los Angeles*, 331 U. S. 543, 67 S. Ct. 1428 (1947), this Court said, at page 546 (67 S. Ct. p. 1430):

> "Under § 237 of the Judicial Code, 28 U. S. C. § 344, 28 U. S. C. A. § 344, only 'final judgments' of state courts may be appealed to this Court. And it frequently has been said that for a judgment of an appellate court to be final and reviewable for this purpose it must end the litigation by fully determining the rights of the parties, so that nothing remains to be done by the trial court 'except the ministerial act of entering the judgment which the appellate court * * * directed.' Department of Banking, State of Nebraska, v. Pink, 317 U. S. 264, 267, 63 S. Ct. 233, 235, 87 L. Ed. 254. Thus, where the effect of the state court's direction is to grant a new trial, the judgment will not be final."

Second. *In Market St. Ry. Co. v. Railroad Commission of State of California et al.*, 324 U. S. 548, 65 S. Ct.

770 (1945), the holding of the Court was that ". . . finality is not deferred by the existence of a latent power in the rendering court to reopen or revise its judgment" (324 U. S. p. 551, 65 S. Ct. p. 773). The question decided there has absolutely no relevance to this case.

Third. In *Richfield Oil Corp. v. State Board of Equalization*, 329 U. S. 69, 67 S. Ct. 156 (1946), an appeal was taken to the Supreme Court of California on facts which had been stipulated and the Supreme Court of California reversed the trial court. We need do no more than refer to this Court's distinction of *Richfield* from the situation here.

In *Gospel Army v. City of Los Angeles*, 331 U. S. 543, 67 S. Ct. 1428 (1947), *supra*, this Court said, at page 547 (67 S. Ct. 1430):

> "Thus, this term in Richfield Oil Corporation v. State Board of Equalization, *supra*, despite the fact that the Supreme Court of California had reversed a judgment without directions, we determined on the entire record and upon an independent investigation of California law that the judgment was final for the purposes of § 237. In the first place, the facts had been stipulated and, so far as appeared, the stipulation would have been available and controlling upon a second trial. In the second place, the suit was one for a refund of a tax and under California law only those grounds presented in the prior claim for refund could be urged in the suit. The opinion stated: 'Since the facts have been stipulated and the Supreme Court of California has passed on the issues which control the litigation, we take it that there is nothing more to be decided.' 329 U. S. at pages 73, 74, 67 S. Ct. at page 159.
>
> "In this case, however, the facts have not been stipulated, nor are there any special procedural restrictions. Thus, under California law, the Gospel

Army on the second trial to which it is entitled may amend its complaint and present new facts. * * *"

There is one final crushing fact of record. It destroys respondent's whole specious legal argument on jurisdiction.

On November 13, 1956 at the second trial of this case, counsel for both parties entered into the only stipulation in this entire record. Respondent's whole brief has significantly kept away from those portions of the stipulation which unseat its whole position.

This was the pertinent provision to which both parties bound themselves in formal judicial proceedings:

> "4. That the said action resulted in a verdict for the plaintiff which, on appeal to the Supreme Court of Alabama, was reversed and remanded for a new trial, without entry of a final judgment." (R.28-29)

This provision speaks with a clarity that could not be more exact: (1) *there was no final judgment on the first appeal* and (2) *the Supreme Court of Alabama reversed and remanded for a new trial.* Respondent has with finality spread both of those concessions upon this record. Its massive failure of candor with this Court is manifest when its jurisdictional argument is tested by this record stipulation.

This is not all. Respondent not only has agreed that there was no final judgment on the first appeal, but it further stipulated in the same judicial proceeding:

> "10. That neither party shall be deemed to have waived hereby the right to appeal any action of the trial court based upon this stipulation, and that neither party shall be deemed to have waived hereby the right to file a petition for a Writ of Certiorari with the Supreme Court of the United States." (R.29-30)

This stipulation is diametrically opposed to just that jurisdictional argument respondent now strains to impose upon the substantial merits of the Petition: that we have waived our right to petition for the Writ by not proceeding here after the decision in the first appeal which respondent concedes of record was not final.

We leave to the respondent the irrelevant task of drawing whatever value judgments it wishes from this behavior.

Respondent's silence concerning its record concession and argument is not overly strange. The reason for that silence is undoubtedly the fact that it has no answer.

Its comparative silence on the merits is explainable on the same basis.

## CONCLUSION.

This is fundamentally an uncomplicated case. It presents an eminently reviewable question for all the substantial reasons expressed in the Petition.

We have dealt accurately with the facts and circumstances surrounding this issue. We have exhaustively briefed controlling law. In contrast respondent has unfortunately seen fit to mask the substantial issue in a jurisdictional argument as to finality that is legally untenable and doubly so when tested by the record fact that respondent has irrevocably conceded the very truth that it now wants this Court to believe is not the truth: that there was no final judgment on the first appeal. As to the merits, respondent has remained significantly silent.

We seek here simple and final relief. This cause presented a jury question which a jury resolved in petitioner's favor. A mere naked reversal by this Court would result only in a third trial, which would give respondent precisely what it sought and erroneously obtained in the Alabama Supreme Court.

This Court has effectively scotched respondent's contention (brief, p. 15) that it can review only the second appeal. As long ago as *United States v. Denver & Rio Grande Railroad Company*, 191 U. S. 84, 24 S. Ct. 33 (1903), where the case, as here, had been twice before the state appellate court, this Court said (191 U. S. p. 93. 24 S. Ct. p. 35):

> "While the supreme court of New Mexico upon this second writ of error may have considered itself bound by its decision upon the question here involved upon the first writ as the law of the case, we are not ourselves restrained by the same limitation. As its judgment upon the first writ was merely for a reversal of the court below, and for a new trial, such judgment, not being final, could not be made the subject of a writ of error from this court. Upon the present writ, however, we are at liberty to revise the action of the court below in both instances."

And as late as *Urie v. Thompson*, 337 U. S. 163, 69 S. Ct. 1018 (1949), where again there had been two appeals to the state supreme court, the Court said, at page 172 (69 S. Ct. p. 1026):

> "* * * Local rules of practice cannot bar this Court's independent consideration of all substantial federal questions actually determined in earlier stages of the litigation by the court whose final adjudication is brought here for review. * * *"

This Court there reinstated plaintiff's verdict.

We respectfully submit it is time this litigation ended. This Court has the power to direct reinstatement of the original judgment for petitioner: See Petition, p. 29. We ask that the Petition be granted and that the judgment of the Supreme Court of Alabama be reversed with directions to enter judgment for the plaintiff in the amount of

$46,600.00 together with such costs, interest and penalties as have accrued under Alabama law.

Respectfully submitted,

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